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No. 93-1145

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN E. FILIOS, ET AL., PETITIONERS

v.

MASSACHUSETTS COMMISSIONER OF REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether state taxation of the non-contributory retirement plan benefits paid to federal military retirees violates 4 U.S.C. 111 when contributory and non-contributory retirement plan benefits paid to state and local employees are wholly exempt from state tax.

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INTEREST OF THE UNITED STATES

The Commonwealth of Massachusetts requires members of the United States Armed Forces to pay state income tax on their retirement pay. Pensions and annuities paid to retired state and local government employees, however, are exempt from taxation under the Massachusetts scheme.

The States may not discriminate in taxing the income of federal employees. See 4 U.S.C. 111; *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989); *Barker* v. *Kansas*, 112 S. Ct. 1619 (1992). The United States has a continuing interest in ensuring that its employees are not subjected to discriminatory state tax treatment.

STATEMENT

1. Massachusetts imposes an income tax on retirement benefits, pensions and annuities.[1] The State wholly exempts from this tax, however, any "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." Mass. Gen. Laws Ann. ch. 62, § 2(a)(2) (E)(Law. Co-op. 1990). Payments received by persons who participated in the pre-1938 noncontributory retirement system for state and local police and firemen are also exempt from the Massachusetts income tax. 1973 Mass. Acts, ch. 876, § 1.

Under the current, contributory retirement system for state and local employees in Massachusetts, 10% of the retirement funds are contributed by the employee and 90% by the governmental units (Pet. App. A48-A49). Beginning in 1987, the employee's share of the plan funding is paid by the state and local government units. Mass. Gen. Laws Ann. ch. 32, § 22(10)(Law. Co-op. 1993). To the extent that the contribution made by the employee—or, after 1987, by the employer on the employee's behalf—exceeds $2000, the employee is subject to the Massachusetts income tax on the excess. See Mass. Gen. Laws Ann.

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[1] Gross income is defined for purposes of the Massachusetts tax as federal gross income subject to state adjustments. Mass. Gen. Laws Ann. ch. 62, § 2 (Law. Co-op. 1990). Pension income is included in federal gross income. 26 U.S.C. 61(a)(9) and (11).

ch. 32, § 22(10)(Law. Co-op. 1993); *id.* ch. 62, § 2(a)(1)(I); *id.* ch. 62, § 3B(a)(4).[2]

The Massachusetts provisions have the following effect: (i) Federal, state and local employees who participate in contributory retirement systems pay state income tax on contributions made by them, or on their behalf, in excess of $2000 per year. Without regard to whether, and to what extent, such personal contributions have in fact been made, participants in "contributory" plans pay no state tax on retirement benefits as received. (ii) Police and fire employees who receive retirement benefits under the pre-1938 Massachusetts noncontributory retirement system also pay no state tax on their retirement benefits. (iii) But federal military retirees, whose pension system is noncontributory, *do* pay state income tax on retirement payments.

2. Petitioners are fourteen retired members of the United States Armed Forces and thirteen spouses who were subject to the Massachusetts income tax on military retirement benefits for years from 1985 through 1988 (Pet. App. A2-A4, A6-A8, A45, A52). Petitioners filed applications for abatement of the state income tax paid on their military retirement benefits, asserting that the more favorable tax treatment afforded to the retirement benefits of state and local government employees violated the nondiscrimination requirement of 4 U.S.C. 111 and the constitutional doctrine of intergovernmental immu-

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[2] The $2000 limit on the tax deduction for the employee share of the annual contribution is reduced by any amount that the employee has paid that year as his personal share of federal employment taxes. Mass. Gen. Laws Ann. ch. 62, § 3B(a)(3) and (4) (Law. Co-op. 1990).

nity (Pet. App. A2-A9). When these applications were denied, petitioners appealed to the Massachusetts Appellate Tax Board.

The Board rejected petitioners' claims (Pet. App. A2-A43, A45). In the Board's view, Massachusetts did not discriminate against federal military retirees by distinguishing between contributory and noncontributory retirement systems (*id.* at A32-A33). The Board recognized that the retirement benefits of retirees from local police and fire departments who remained in the pre-1938 noncontributory retirement system were exempt from Massachusetts income tax. The Board concluded, however, that this facial discrimination in the tax treatment of federal military retirement benefits was not pertinent because petitioners had failed to demonstrate that any person currently received benefits under the pre-1938 Massachusetts noncontributory retirement system (*id.* at A33-A35).[3]

3. The Massachusetts Supreme Judicial Court affirmed (Pet. App. A44-A51). Noting that the retirement systems of the Commonwealth and its local governments were "contributory" and that the retirement system of the federal military was "noncontributory," the court concluded that these "significant differences" justified a different tax treatment of the retirement benefits under the plans (*id.* at A47). The court stated, without elaboration, that the fact that Massachusetts employees contribute only 10% of the funding of the retirement

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[3] The Board also rejected petitioners' argument that the difference in tax treatment of contributory and noncontributory retirement systems violated Article 44 of the Massachusetts constitution (Pet. App. A37-A43).

benefits in their "contributory" plans "is not sufficient to negate the differential tax treatment between the pension systems" (*id.* at A49). The court also concluded that the Massachusetts exemption for retirement benefits received by municipal fire and police personnel under the pre-1938 noncontributory system was irrelevant because petitioners had failed to demonstrate that anyone was collecting a pension under that system (*id.* A49-A50).

DISCUSSION

The decision in this case misinterprets and misapplies this Court's decisions in *Barker* v. *Kansas*, 112 S. Ct. 1619 (1992), and *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989).[4]

1. Congress has consented to state taxation of federal employees only when "the taxation does not discriminate against the * * * employee because of the source of the pay or compensation." 4 U.S.C. 111. This statutory nondiscrimination requirement is coextensive with the prohibition against discriminatory taxes embodied in the constitutional doctrine of intergovernmental tax immunity. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. at 812-813. As the Court emphasized in *Davis*, the standard for determining whether a state tax abridges the immunities of the federal government is quite different from the standard under which state economic regulations are tested under the Equal Protection Clause. 489 U.S. at 816. Inconsistent state tax treatment of federal and state employees is permitted only when it "is

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[4] *Barker* and *Davis* apply to all open tax years and are therefore applicable to this case. See *Harper* v. *Virginia Department of Taxation*, 113 S. Ct. 2510 (1993).

directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 816, quoting *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 383 (1960). Applying this standard, the Court rejected as insufficient the distinctions asserted to exist between federal and state retirement programs in invalidating state tax provisions that discriminated against federal pension benefits in *Davis* and *Barker*.

In this case, Massachusetts asserts a distinction that was not directly at issue in *Davis* or *Barker*.[5] Massachusetts taxes "noncontributory" federal military retirement benefits while exempting from tax the "contributory" retirement benefits paid to other government employees. The Massachusetts court reasoned that the difference between "contributory" and "noncontributory" systems is significant because the Commonwealth taxes personal contributions to the retirement system as income in the year in which the contribution is made. Under the noncontributory federal military retirement system, by contrast, pension funding is not included in the gross income of the employee and is therefore not subject to tax at the time of funding (Pet. App. A47-A48).

This asserted distinction is unpersuasive. Massachusetts retirement benefits are principally funded —and, since 1987, are exclusively funded—through government contributions. See, *e.g.*, Mass. Gen. Laws

[5] In *Barker* v. *Kansas*, the Kansas Supreme Court had noted that the military retirement system was noncontributory while the State used a contributory system. See 112 S. Ct. at 1626 n.5. The Kansas court, however, "did not rest its decision on this difference" and this Court therefore did not directly address that issue on the merits. *Ibid.*

Ann. ch. 32, §§ 1, 12(2), 22, 22C (Law. Co-op. 1993). Before 1987, the state or local government unit contributed 90% of the funding for retirement benefits (Pet. App. A48-A49); after 1987, the state or local government unit contributed 100% of the funding. See page 2, *supra*. The state and local employees are not subject to state tax on amounts up to $2000 per year funded by them or, on their behalf, by their employers. See Mass. Gen. Laws Ann. ch. 62, §§ 2(a)(1)(I), 3B(a)(4) (Law. Co-op. 1990). See also note 2, *supra*. Thus, Massachusetts seeks to justify taxation of the *full* measure of military retired pay on the ground that some small *part* of the benefits received by state and local employees may have previously been taxed by the State (Pet. App. A48-A49).

The rationale of the court below is further undermined by the fact that the Commonwealth exempts from state tax all retirement benefits paid to municipal police and firemen under the pre-1938 *non*-contributory retirement plan. The fact that the record of this case does not disclose how many persons currently receive such benefits does not alter the fact that the State's "nondiscriminatory" rationale is inconsistent with the State's facially discriminatory legislation.

Moreover, the rationale offered by the Supreme Judicial Court is foreclosed by this Court's decision in *Davis* v. *Michigan Dep't of the Treasury*. In *Davis*, the State sought to justify its tax discrimination against federal retirees by contending that the retirement benefits paid to federal employees were, as a general matter, more generous than those paid to state retirees. 489 U.S. at 816-817. The Court rejected that purported justification because "[a] tax

exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits * * *; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Under this same reasoning, a tax intended to account for prior taxation of retirement funding would not discriminatorily exempt certain benefits based on their source; instead, it would apply to retirement benefits generally and exempt benefits only to the extent that they reflect previously taxed contributions.

Under the standard applied by this Court in *Davis* and *Barker*, Massachusetts's facially discriminatory taxation of military retirement benefits lacks any coherent or consistent rationale. It is therefore invalid under 4 U.S.C. 111. If the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's prior decisions.[6]

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[6] There appears to be a question as to whether the petition in this case is timely. The Massachusetts court issued its decision on the appeal of John E. Filios and his wife, Eleanor G. Filios, on July 13, 1994 (Pet. App. A44 & n.1). The petition for a writ of certiorari was filed more than 90 days later, on November 22, 1994. At the time of the July decision, the court had declined to treat the other named petitioners as appellants in that case. See Pet. App. A45 n.2. A motion for reconsideration of that aspect of the court's order was granted by the Massachusetts court on October 26, 1993 (Pet. App. A52). The petition for a writ of certiorari on behalf of these parties was filed 27 days thereafter.

Rule 13.4 of the Rules of this Court provides that "if a petition for rehearing is timely filed in the lower court by any

CONCLUSION

To the extent that the petition for a writ of certiorari is timely, it should be granted. See note 6, *supra*.

Respectfully submitted.

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party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment."

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